Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-Malaysian Finance Bhd & Anor

COURT OF APPEAL — CIVIL APPEAL NO P–02–317 OF 1997
MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ JJCA
18 APRIL 2003

Civil procedure *— Locus standi — Sale of land — Whether purchaser had locus standi to apply for an extension of time*

Land law *— Sale of land — Time — Conditions of sale — Extension of time — Purchaser applied for extension of time after 90 days — Whether senior assistant registrar had jurisdiction to grant extension of time*

Land Law *— Sale of land — Time — Conditions of sale — Extension of time — Whether purchaser provided reasons for extension*

This appeal concerned an extension of time to pay the balance of the purchase price, granted by the senior assistant registrar to the purchaser (the respondent/applicant in this appeal) of the appellant's apartment at a public auction carried out at the instance of the respondents to recover moneys lent to the appellant on the security of the apartment. The respondents obtained the order for sale of the apartment on 19 April 1994 ('the main action'). The purchaser was the successful bidder at the public auction on 18 December 1996. The purchaser paid 10% of the price. The sale conditions stated, inter alia, that the balance of the price had to be paid within 90 days from the date of the auction. The period could be extended by the senior assistant registrar if the purchaser made the application before the period expired on 18 March 1997. The purchaser filed an application by summons in chambers for an extension of time on 12 March 1997. The purchaser explained by affidavit that although her loan had been approved, the bank needed certain documents, including the consent of the developers to the sale and assignment of the apartment. Copies of the purchaser's summons in chambers were served on the solicitors for the appellant and the respondents on 12 March. The application, when sealed, became encl 37 and 21 March was the date of hearing. At the date of hearing, the application was struck out because the solicitors of the purchaser did not appear as they were not aware of the hearing date. After the purchaser's solicitors received the sealed copy of the application, one of them went to see the senior assistant registrar. They explained to the senior assistant registrar and the senior assistant registrar directed the solicitor to file another summons in chambers. On the same date, but after the 90 days as given by the sales conditions another application was filed for a three month extension, encl 40. This application was served and heard on 5 April 1997 and an extension of two months was allowed. The appellant's counsel did not object that the application at encl 40 was made after the 90 days because he thought that the application that was being heard was encl 37, that had been filed within time. The purchaser then filed an affidavit to set out the fact and fate of encl 37. The appellant's

counsel stated that the purchaser should have applied to reinstate the application. The appellant's appeal was dismissed by the judge in chambers. The appellant appealed. The appellant's counsel raised three issues, that the purchaser did not explain the need for her application extension, that the purchaser had no locus standi to apply for an extension and the application was made after the time allowed.

Held, dismissing the appeal with costs:

(1) The purchaser's need for the extension was as explained in the purchaser's affidavit and it was a reasonable explanation (see p 453G –H).

(2) It was clear from O 15 r 6 of the Rules of the High Court 1980 that the purpose of adding a party to a cause or matter is to contribute to the effective, complete and global disposal or determination of the dispute in the cause or matter or of the relief or remedy that is claimed in it. In the main action the dispute was between the respondents and the appellant. The respondents sought an order for sale of the security to recover a debt due from the appellant. The purchaser was a complete stranger to the dispute. She came into the picture only after the dispute was determined and only as a purchaser. An application by her to be added as a party to the dispute would have been contrary to the purpose of the joinder that is provided for by para (2)(b) of O 15 r 6. The purchaser came in in her own right by virtue of para 12 of the sale conditions. She was given the right to apply for an extension of the time for paying the purchase price. The appeal on the ground of locus standi must fail (see p 454C–F).

(3) It was not anybody's fault that encl 37, which had been filed in time, was struck out. If at all there was a fault in this case it was only in the senior assistant registrar's directing the purchaser's solicitor to file another application instead of advising him to apply for reinstatement of encl 37, and in the solicitor's complying with the direction. In the circumstances, encl 40 was a substitute for encl 37 and as standing in place of encl 37, and therefore was an application that was as good as if encl 37 had been reinstated. The application for extension of time which was resurrected in encl 40 cannot, therefore, be truly said, for the purposes of para 12, to have been filed out of time (see p 455C–F).

(4) There is another way of looking at the problem. It was held in *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 that the order for sale and the conditions of sale were to be regarded as the sale and purchase agreement between the chargee as vendor and the purchaser. Likewise the order for sale and the sale conditions in this case are regarded as the sale and purchase agreement between the respondents and the purchaser. The purchaser filed encl 40 13 days after the expiry of the period prescribed by para 12, but the respondents, the other party to the contract, did not object to the application for extension, thus waiving the contractual requirement as to the time within which to apply for extension. The court does not think that it was improper for the respondents to waive the requirement of para 12. Strict compliance with para 12 being properly waived by the rightful contracting party, the order of

A the senior assistant registrar cannot be said to have been made without jurisdiction by reason of the application for extension being filed out of time (see p 455F–456A).

[**Bahasa Malaysia summary**

B Rayuan ini adalah mengenai perlanjutan masa untuk membayar baki harga belian yang dibenarkan oleh penolong kanan pendaftar kepada pembeli (responden/permohon di dalam rayuan ini) pangsapuri perayu di lelong awam yang diadakan di atas permintaan responden-responden untuk mendapat kembali wang yang dipinjam kepada perayu di atas cagaran pangsapuri. Responden-responden telah C mendapatkan perintah jual di atas pangsapuri itu pada 19 April 1994 ('tindakan utama'). Pembeli meruapakan penawar yang berjaya di lelong awam pada 18 Disember 1996. Pembeli tela membayar 10% daripada harga belian. Syarat-syarat ualan lelong itu menyatakan, antara lain, bahawa baki harga belian hendaklah dibayar di dalam tempoh 90 hari daripada tarikh lelong awam. Tempoh ini boleh D dilanjutkan oleh penolong kanan pendaftar jika pembeli membuat permohonan sebelum tempoh masa luput pada 18 Mac 1997.Pembli telah memfailkan permohonan melalui saman dalam kamar untuk lanjutan masa pada 12 Mac 1997. Pembeli telah menerangkan melalui afidavit bahawa walaupun pinjaman beliau telah diluluskan, bank itu memerlukan beberapa dokumen, termasuk izin pemaju ke atas jualan E dan serahhak pangsapuri itu. Salinan-salinan saman dalam kamar pembeli telah disampaikan ke atas peguam-peguam perayu dan responden-responden pada 12 Mac. Permohonan itu, setelah dimeteraikan, menjadi kandungan 37 dan tarikh pendengaran adalah pada 21 Mac. Pada hari pendengaran, permohonan itu telah diketepikan sebab peguam pembeli tidak hadir oleh kerana mereka F tidak sedar akan tarikh pendengaran itu. Setelah peguam pembeli menerima salinan termeterai permohonan itu, seorang daripada mereka telah berjumpa dengan penolong kanan pendaftar. Beliau telah menerangkan kepada penolong kanan pendaftar dan penolong kanan pendaftar telah mengarahkan beliau supaya memfailkan saman dalam kamar lain. Pada tarikh yang sama, tetapi selepas tempoh masa G 90 hari seperti di dalam syarat-syarat jualan lelong, satu lagi permohonan telah difailkan memohon lanjutan tiga bulan, kandungan 40. Permohonan itu telah disampaikan dan didengar pada 5 April 1997 dan lanjutan dua bulan telah dibenarkan. Peguam perayu tidak membantah bahawa permohonan di kandungan 40 telah dibuat selepas tempoh masa 90 hari kerana beliau menganggap bahawa H permohonan yang didengar adalah kandungan 37, yan telah difailkan di dalam tempoh masa. Pembeli kemudian telah memfailkan afidavit yang membentangkan fakta-fakta dan apa yang telah berlaku kepada kandungan 37. Peguam perayu telah mengatakan bahawa pembeli patut memohon untuk menghidupkan semula permohonan itu. Rayuan perayu telah ditolak oleh hakim dalam kamar. Perayu merayu. Peguam perayu membangkitkan tiga isu, bahawa pembeli tidak I menerangkan keperluan beliau untuk lanjutan masa permohonan beliau, pembeli tidak mempunyai locus standi untuk memohon lanjutan masa dan permohonan itu telah dibuat selepas tempoh masa.

Diputuskan, menolak rayuan dengan kos: A

(1) Keperluan pembeli untuk lanjutan masa telah diterangkan di dalam afidavit beliau dan ia adalah penerangan yang munasabah (lihat ms 453G–H).

(2) Ia adalah jelas daripada A 15 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 bahawa tujuan menambahkan parti kepada suatu B tindakan atau perkara adalah untuk menyumbang kepada keberkesanan, kesempurnaan dan keseluruhan penyelesaian pertikaian di dalam kausa atau tindakan atau kepada relif atau remedi yang dituntut. Di dalam tindakan utama pertikaian adalah di antara responden-responden dan perayu. Responden-responden memohon perintah jual cagaran itu untuk mendapat C kembali hutang daripada perayu. Pembeli adalah orang asing kepada pertikaian itu. Beliau telah memasukki keadaan ini setelah pertikaian telah diselesaikan dan hanya sebagai pembeli. Permohonan oleh beliau untuk dimasukkan sebagai parti keapad pertikaian akan bercanggah dengan tujuan percantuman yang diperuntukkan oleh perenggan (2)(b) A 15 k 6. Pembeli telah masuk melalui hak beliau melalui perenggan 12 syarat-syarat D jualan lelong. Beliau telah diberi hak untuk memohon lanjutan masa untuk membayar harga belian. Rayuan di atas alasan locus standi mesti gagal (lihat ms 454C–F).

(3) Tiada sesiapa yang bersalah bahawa kandungan 37, yang telah difailkan di dalam tempoh masa, diketepikan. Jikalau terdapat kesalahan di dalam kes ini ia adalah arahan penolong kanan E pendaftar mengarahkan peguam pembeli untuk memfailkan permohonan lain dan bukan meminta peguam pembeli memohon kandungan 37 itu dihidupkan semula dan di dalam peguam pembeli mematuh arahan itu. Di dalam keadaan itu kandungan 40 adalah ganti kandungan 37 dan oleh itu ia adalah permohonan seperti jika kandungan 37 dihidupkan semula. Permo- F honan untuk lanjutan masa yang telah dibangkitkan semula di dalam kandungan 40, tidak dapat dikatakan, untuk tujuan perenggan 12, telah difailkan selepas tempoh masa (lihat ms 455C–F).

(4) Terdapat cara yang lain untuk menyelesaikan masalah ini. Ia telah diputuskan di dalam *Malayan United Finance Bhd, Johore* G *Bahru v Liew Yet Lan* [1990] 1 MLJ 317 bahawa perintah jual dan syarat-syarat jualan lelong dianggap sebagai perjanjian jual beli di antara pemegang gadaian sebagai penjual dan pembeli. Sama seperti itu, perintah jual itu dan syarat-syarat jualan lelong di dalam kes ini dianggap sebagai prjanjian jual beli di antara responden-responden dan pembeli. Pembeli telah memfailkan kandungan 40 13 hari selepas luput tempoh masa yang diper- H untukkan oleh perenggan 12, tetapi responden-responden, parti yang lain kepada perjanjian itu, tidak membantah kepada permohonan lanjutan masa dan telah menepikan keperluan perjanjian ke atas tempoh masa untuk membuat permohonan untuk lanjutan masa. Mahkamah tidak berpendapat bahawa ia adalah salah untuk menepikan keperluan perenggan 12. Memandang- I kan pematuhan tegas dengan perenggan 12 yang telah ditepikan oleh parti perjanjian betul, perintah penolong kanan pendaftar tidak boleh dikatakan dibuat tanpa bidang kuasa oleh kerana

permohonan untuk lanjutan itu dibuat selepas tempoh masa (lihat ms 455F–456A).]

Notes

For cases on locus standi on sale of land, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), para 3966.

For cases on time in sale of land, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), para 3820.

Cases referred to

Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan [1990] 1 MLJ 317 (refd)

Legislation referred to

National Land Code

Rules of the High Court 1980 O 15 r 6, (2)(a), (2)(b),

Surinder Singh Gill (*Ong & Manecksha*) for the appellant

Regina Daniel (*Cheong Wai Meng & Van Buerle*) for the respondents.

Simon Tan Hong Jin (*Ban Eng, Annual & Foong*) for the respondent/applicant.

Appeal from: Saman Pemula No 24-273-1994 (High Court, Pulau Pinang)

Abdul Aziz JCA (delivering judgment of the court): This appeal concerns an extension of time to pay the balance of purchase price, granted by the senior assistant registrar to the purchaser (the respondent/applicant in this appeal) of the appellant's apartment at a public auction carried out at the instance of the respondents to recover moneys lent to the appellant on the security of the apartment. The appellant's appeal to the judge in chambers against the grant of the extension of time was dismissed and the appellant now further appeals to this court.

The respondents obtained the order for sale of the apartment on 19 April 1994 on their application by originating summons ('the main action'). The public auction at which the purchaser was the successful bidder was held on 18 December 1996. The price was RM287,000, of which the purchaser paid RM28,700 (10%) on that day, leaving a balance of RM258,300. Paragraph 12 of the 'Syarat-syarat Jualan Lelong' ('the sale conditions') provided as follows:

> Baki harga pembelian hendaklah dibayar oleh pembeli dengan bank deraf dalam tempoh sembilan puluh (90) hari dari tarikh jualan lelong kepada Mahkamah Tinggi Pulau Pinang *ataupun tempoh sembilan puluh (90) hari dari tarikh kebenaran diberi oleh pihak Berkuasa Negeri untuk memindahmilik harta berkenaan (sekiranya perlu)*. Walau bagaimanapun, jangka masa sembilan puluh (90) hari tersebut boleh dipanjangkan oleh penolong kanan pendaftar atas permohonan pembeli sebelum tamat tempohnya dan sekiranya diterima alasan yang diberi untuk memanjangkan tempoh tersebut. Permohonan ini hendaklah dibuat secara saman dalam kamar.

(The underscoring relating to the consent of the State Authority is original). A

According to that paragraph, the purchaser had to pay the balance of RM258,300 within 90 days from the date of the auction. The period could, however, be extended by the senior assistant registrar provided that the purchaser made the application before the period expired. It is common ground that the period expired on 18 March 1997. (The period highlighted by the underscoring is not relevant because no question has arisen that the B consent of the State Authority was required for a transfer).

On 12 March 1997, before the expiry of the period, the purchaser filed in the main action an application by summons in chambers for an extension of time. In support of her application, the purchaser explained by affidavit that on 4 February 1997 Hong Leong Bank had approved a loan of RM240,000 for the purchaser to purchase the apartment but it would take C some time before the loan could be released because certain documents that Hong Leong Bank required the respondents to furnish before the loan could be released had not yet been furnished. One of the documents was the consent of the developers to the sale and assignment of the apartment by the respondents to the purchaser. The purchaser exhibited a letter dated 28 February 1997 from Hong Leong Bank's solicitors to the respondents' D solicitors requesting for those documents. According to the letter, another document, besides others, that was required was the respondents' letter of undertaking to do two things, one of which was to refund the loan in the event that the deed of assignment between the respondents and the purchaser could not be perfected. Although nothing has arisen about it, I think that it is appropriate to say, for the sake of completeness, that it seems to me from the mention of the developers' consent and of an assignment E from the respondents to the purchaser that there was yet no separate title to the apartment, that the legal owner of the apartment was still the developers as the legal owner of the entire land of which the apartment was yet an unsubdivided part, and that the security for the loan given by the respondents was in the form of an assignment of the appellant's rights in respect of the apartment to the respondents and not in the form of a charge under the National Land Code. F

Advance copies of the purchaser's summons in chambers and supporting affidavit were served on the respective solicitors for the appellant and the respondents on 12 March 1997 itself. The application, when sealed, became encl 37 and 21 March 1997 was given as the date of hearing. At the date of hearing the application was struck out because no one appeared for G the purchaser and that was because her solicitors did not know of the date of hearing. They only knew of the date on 25 March 1997 when they received the sealed copies of the application. The appellant and respondents would also have been absent on 21 March 1997 because they too would not have known of the date since a sealed copy of the application bearing the date of hearing would not have been served on them by the purchaser's solicitors before that date. H

After the purchaser's solicitors received the sealed copy of the application, one of them went on 31 March 1997 to see the senior assistant registrar, who informed the solicitor that the application had been struck out on 21 March 1997. Upon hearing the solicitor's explanation of the reason for the absence of the purchaser's counsel on 21 March, the senior I assistant registrar directed the solicitor to file another summons in chambers. Accordingly, on the same date, 31 March 1997, but after the 90 days set by para 12 of the sale conditions, another application similar to encl

A 37 was filed seeking extension of time of three months after receipt by the purchaser of the developers' consent to the sale to the purchaser. The second application was duly sealed to become encl 40, was served on the appellant and the respondents, and was heard on 5 April 1997 by the senior assistant registrar, who allowed an extension of two months from 18 March 1997 but ordered the purchaser to pay to the respondents interest on the B balance purchase price from that date until settlement and to pay costs to the appellant and the respondents.

Before the senior assistant registrar, no objection was taken by the appellant that the application at encl 40 was made after the period of 90 days prescribed by para 12 of the sale conditions. Therefore the fact and fate of encl 37 did not at that time come into the open. It is interesting to note C that in the appeal before the judge in chambers, where the question was raised, the appellant's counsel is on record as saying that it was not raised before the senior assistant registrar because the appellant's counsel was not aware that it was encl 40 that was being heard. Taking the answer to be true, I would assume that the appellant's counsel thought that the application that was being heard was encl 37, which had been filed within time and of which the appellant's solicitors had received an unsealed copy.

D

Because that was the first time that the question was raised, the purchaser, the appellant's counsel not objecting, obtained the judge's leave to file an affidavit to set out the fact and fate of the previous application at encl 37 that I have already set out.

In response to the disclosures made by the affidavit, the appellant's E counsel submitted before the judge that the right procedural step would have been for the purchaser to apply to reinstate encl 37.

The judge dismissed the appeal on 12 May 1997.

We learn from the written outlines of submission of the purchaser and the respondents and from the oral submission of the purchaser's counsel that by 16 May 1997. within the extended period, the balance of the purchase F price and the interest on it on account of the extension had been paid into court, that on 26 September 2000 the respondents' solicitors, out of the total sum paid into court, were paid the amount due to the respondents and the appellant's solicitors were paid the remainder, and that the apartment has already been disposed off by the purchaser to another party.

G In his oral submission before us, the appellant's counsel raised three issues.

As to one of the issues, it was said that the purchaser did not explain the need for her application for extension. That is not true. The need for the extension was as explained in her affidavit and as I have set out. It was a reasonable explanation.

H As to another issue, it was submitted that the purchaser had no locus standi to apply for extension because she had not been made a party in the main action (which, as I said, was begun by originating summons). Order 15 r 6 of the Rules of the High Court 1980 was cited in support of the submission. Paragraph 2(b) of O 15 r 6, as far as material, provides as follows:

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> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

(a) ...

(b) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

It is clear to me from a reading of those provisions that the purpose of adding a party to a cause or matter is to contribute to the effective, complete and global disposal or determination of the dispute in the cause or matter or of the relief or remedy that is claimed in it. In the main action the dispute was between the respondents and the appellant. The respondents sought an order for sale of the security to recover a debt due from the appellant. The purchaser was a complete stranger to the dispute, which was determined when the order for sale was granted. The purchaser came into the picture only after the dispute was determined and only as a purchaser, and she was still a stranger to the dispute that had already been determined. An application by her to be added as a party to the dispute would have been contrary to the purpose of the joinder that is provided for by para (2)(b) of O 15 r 6. The purchaser came in in her own right by virtue of para 12 of the sale conditions. She was given by that paragraph the right to apply for an extension of the time for paying the purchase price. She could have originated proceedings to seek the extension but for the fact that para 12 required her application to be by summons in chambers, which could not be used to commence proceedings. The course open to her was to apply by summons in chambers in the main action, but, as I said earlier, she could not properly have applied to be joined as a party under para (2)(a) of O 15 r 6. To my mind the appeal on the ground of locus standi must fail.

The main issue raised in oral submissions before us is the question of compliance with para 12 of the sale conditions. The argument is that since the application for extension of time made by encl 40 was made after the time allowed by para 12, the application was disqualified and the senior assistant registrar had no jurisdiction to entertain it.

The learned judge, considering the circumstances, had been sympathetic with the purchaser. This was what he said at pp 5 and 6 of his judgment:

> ... the defendant (that is the appellant here) did not challenge nor controvert at all the explanation given for the delay in filling [sic] encl 40. And that explanation, in the considered opinion of the court, is both reasonable and deserving of the sympathy of the court and is more than sufficient to satisfactorily explain the applicant's (that is the purchaser's) delay in making the said application, especially so as that explanation was not

challenged or controverted. Reasonably, it would be harsh and severe indeed, in view of the circumstances related by the applicant, to accept the submission that there was a failure to comply with the conditions of sale. For there was an application (encl 37) within time. Unfortunately, that encl 37 was struck out, not on merits, but by default that applicant or counsel had not contributed and should not therefore be faulted or penalized. Given furthermore that encl 40 was filed as directed by the learned senior assistant registrar, it could not just be fairly said that encl 40 was truly filed out of time.

The judge took the view that, in the circumstances, encl 40 could not be fairly said to be filed out of time.

I am in general agreement with the judge. It was not anybody's fault that encl 37, which had been filed in time, was struck out. If at all there was a fault in this case it was only in the senior assistant registrar's directing the purchaser's solicitor to file another application instead of advising him to apply for reinstatement of encl 37, and in the solicitor's complying with the direction. Maybe the senior assistant registrar did not know about the remedy of reinstatement or maybe he knew but considered that it would be neater to have another application filed, not realizing the technical risk that such a course would involve in respect of compliance with para 12. Certainly filing another application would involve less work than applying for reinstatement because in the latter case there would be two applications to be heard, the application for reinstatement, and also, if it succeeded, encl 37, whereas in the former case there would be only one application to be disposed of, encl 40. If reinstatement had been applied for I can see no reason in the circumstances why, even if the application was opposed, reinstatement would not have been ordered. The result of either course would have been the same in that there would have been an application for extension of time to be dealt with. In the circumstances, I would view encl 40 as a substitute for encl 37 and as standing in place of encl 37, and therefore as an application that was as good as if encl 37 had been reinstated. The application for extension of time which was resurrected in encl 40 cannot, therefore, be truly said, for the purposes of para 12, to have been filed out of time.

There is another way of looking at the problem. In the case of an order for sale of land charged under the National Land Code, VC George J (as he then was) held in *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 that the order for sale and the conditions of sale were to be regarded as the sale and purchase agreement between the chargee as vendor and the purchaser. Likewise I would regard the order for sale and the sale conditions in this case as the sale and purchase agreement between the respondents and the purchaser. It is a fact that the purchaser filed encl 40 13 days after the expiry of the period prescribed by para 12, but the respondents, the other party to the contract, did not object to the application for extension, thus waiving the contractual requirement as to the time within which to apply for extension. While the appellant had an interest in a strict observance of the terms of the contract since, for example, if the extension was not allowed, then, under para 13 of the sale conditions, should the purchaser fail to pay the balance within the prescribed period, the deposit shall be forfeited to the respondents to reduce the appellant' debt. I do not think, looking back now at the circumstances, that it was improper for the respondents to waive the requirement of para 12. Strict

compliance with para 12 being properly waived by the rightful contracting party, the order of the senior assistant registrar cannot be said to have been made without jurisdiction by reason of the application for extension being filed out of time.

For those reasons I would dismiss this appeal with costs.

My learned brothers, Mokhtar Sidin and Mohd Saari JJCA, have had an opportunity of reading this judgment in draft and have expressed their concurrence with it.

Appeal dismissed with costs.

Reported by Chew Phye Ken